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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

EMILIO VALDEZ, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 361.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a writ of error to the Supreme Court of the Philippine Islands from a judgment finding the defendant below, Emilio Valdez, guilty of murder and sentencing him to death. That portion of the brief of the plaintiff in error which is devoted to the argument consists of 39 pages, of which 14 pages are given over to the discussion of the legal questions claimed to be involved and the remaining 25 pages to an attempt to show that the evidence submitted was insufficient to warrant the conviction.

Under the circumstances, it seems appropriate to refer briefly to the history of the case and the course of the trials below.

Emilio Valdez, the plaintiff in error, and one Juan Gatmaitan were charged in the court of first instance

below with the murder of Eusebio Yuson on Sunday evening March 17, 1912. They were tried separately and by different judges and each was convicted of the crime charged. Valdez was sentenced to death and Gatmaitan to life imprisonment under the provisions of article 11 of the Philippine Penal Code upon a finding that he was a densely ignorant man of a low order of intelligence and lacking in mental and moral instruction. (Rec. 281.)

The records of the two trials were brought independently before the Supreme Court of the Philippine Islands. As the case for the prosecution against both of the accused rested almost wholly upon the testimony of the same witnesses, the separate appeals to the Supreme Court of the Philippines, at the request of counsel, were heard and considered together in order that in the interests of justice counsel for the defense might make the fullest use of all the evidence in both cases in behalf of both and each of the accused. (Rec. 281.)

As was said by the Supreme Court of the Philippines:

> Counsel rightly contended that if the credibility of the material witnesses for the prosecution in either case can be impeached successfully by a critical analysis and comparison of the record in the two cases, the judgment of conviction entered in that case should not be affirmed without first giving the accused an opportunity to take advantage of the weakness thus developed in the testimony upon which he was convicted. (Rec. 281.)

Valdez, the plaintiff in error, was tried first below, Gatmaitan being one of the principal witnesses for the prosecution. Upon the trial of Gatmaitan some time afterwards, his c estimony given upon the Valdez trial was use nst him. Otherwise the evidence for the pros cution was substantially the same in both cases. Gatmaitan upon his own trial took the stand in his own defense and repudiated his testimony given in the Valdez trial, which was, briefly, that he had been bribed by Valdez to kill Eusebio Yuson, and that the two went together to Yuson's house for the purpose with a shotgun; that as Yuson was ascending the steps of his home he (Gatmaitan) attempted to shoot Yuson but being unfamiliar with firearms could not make the gun go off, whereupon Valdez pulled the trigger as he (Gatmaitan) was holding the shotgun, and thus the murder was consummated. (Rec. 281, 284.)

At the Gatmaitan trial, an attempt was made to cast suspicion upon a nephew of Valdez, Candido Garcia by name. The testimony on this head was most carefully and exhaustively considered and repudiated by the Supreme Court below, who stated:

> There is nothing in the testimony of these witnesses which raises any doubt in our minds as to the innocence of Candido Garcia. (Rec. 302.)

And the Court further indicated that it believed the evidence in the Gatmaitan case concerning Candido Garcia was an afterthought resulting from the conviction of Valdez, whose case it characterizes as

"hopeless unless some affirmative evidence could be discovered which would cast suspicion on some one else and thus cast a doubt on the judgment of conviction in his case." (Rec. 300.)

It is also to be noted that upon arraignment at his own trial Gatmaitan made the following statement:

> I do not deny that I should be punished, but I can not admit that it was I who fired, but that it was he (referring to Valdez). (Rec. 292.)

Not only was the conviction of Gatmaitan affirmed by the Supreme Court below, but that Court decided that Gatmaitan was not entitled under all the circumstances to have his ignorance and lack of instruction taken into consideration as an extenuating circumstance and modified his sentence of life imprisonment by substituting therefor the death penalty. (Rec. 309.)

That the Supreme Court of the Philippines gave the matter most careful consideration is evident from its minute order of March 26, 1914, the Valdez appeal having been submitted March 7, 1914, and the Gatmaitan appeal January 12, 1914:

> The Court not having been able to arrive at an agreement as to the disposition of the appeals in the cases of *United States* v. *Juan Gatmaitan*, R. G. No. 9021, and *United States* v. *Emilio Valdez*, et al., R. G. No. 8185, concluded to postpone further consideration thereof until the July term; and in view of the gravity of the penalty imposed in the court below and of the extensive oral arguments of counsel on

> the submission of these cases, the court further resolved to authorize counsel in both cases to extend their oral arguments in writing and submit typewritten copies thereof in English and Spanish, not later than May 15, 1914. (Rec. 280.)

The case was duly submitted but the decision was not handed down until March 25, 1915. (Rec. 280.)

Further and because so much of the appellant's brief is given over to a discussion of the weight of the evidence with particular reference to the credibility of the witnesses for the prosecution, we desire to refer to the following extract from the opinion of the Supreme Court below:

> After repeated exhaustive and painstaking examinations of all the evidence in both records, a majority of the court is convinced beyond a reasonable doubt of the guilt of both the appellants. Both of the accused were defended by able and experienced counsel in this Court as well as in the court below. Extended oral arguments and briefs, aggregating some hundreds of pages in length, have been submitted in the course of these proceedings, and we are convinced that nothing which could be brought forward on behalf of the accused has been neglected, and that we have been compelled by their counsel to consider and pass upon every possible argument which could be advanced in support of a claim of reasonable doubt as to their guilt. We can not undertake to discuss every contention which has been put forward by the defense throughout the course of these pro-

> ceedings. That would be impracticable and is unnecessary. It must suffice to say in regard to all the contentions of counsel for the defense not specifically dealt with herein, or conclusively controverted in the briefs filed by the Attorney General, that they have been maturely considered and ruled upon adversely after due deliberation and with full recognition of the right of the accused to the benefit of every reasonable doubt. (Rec. 294.)

It seems also proper at this point, as the sole other contention on the appellant's brief appears to be that the trial judge in the Valdez case committed prejudicial error in taking a view of the vicinity where the murder was committed, to quote the finding of the Supreme Court below with respect thereto:

> A motion for a new trial, which must be denied, is pending before this Court on the ground that an inspection of the vicinity where the murder was committed was made by the trial judge, in the absence of the defendant, Valdez, who was at the time in the provincial jail. The record clearly discloses that this inspection was made with the consent of counsel for Valdez, and that the trial judge was accompanied to the place where the murder was committed by counsel for both the prosecution and the defense.
>
> Some attempt is made in the affidavits accompanying this motion to show that the trial judge took evidence in the course of this visit of inspection, and that there was an attempt

made by some of the bystanders to influence his judgment and his feelings against the accused. A careful examination of these affidavits and the counteraffidavits filed by the appellee satisfies us that nothing more than inspection of the scene of the murder was made by the trial judge, and that no evidence whatever was taken on that occasion; and we are of opinion that under all the circumstances there was no violation of the constitutional right of the prisoner to be confronted with the witnesses. *People* v. *Thorn*, 156 N. Y. 286, 42 L. R. A., 368, and the cases cited in the extended note in the annotated report.

Perhaps we should add that if any of the bystanders did in fact do or say anything which had for its object the influencing of the mind or feelings of the trial judge, the permission of such apparently unanticipated, unauthorized, and perhaps unavoidable intervention by these bystanders was at most error without prejudice, and has had no influence one way or the other in the final disposition of the pending proceedings.

We conclude that the findings of the trial court as to the guilt of both these appellants, Valdez and Gatmaitan, are sustained by the evidence of record beyond a reasonable doubt; and we find no error in either of the records brought here on appeal prejudicial to the rights of the accused. (Rec. 308, 309.)

We have therefore at the outset, despite the asseverations of counsel respecting the contradictions, inconsistencies, and improbabilities alleged to be ap-

parent in the testimony for the prosecution, the following undeniable facts:

The plaintiff in error Valdez and his alleged tool and accomplice Gatmaitan were separately tried by different judges for the murder of Eusebio Yuson; the evidence in each case (with the exception of Gatmaitan's change of front on his own trial and the unsuccessful attempt to fix the crime in that trial on Valdez's nephew Candido Garcia—although on the Valdez trial no attempt was made by the defense to save Valdez in this manner) was substantially the same and the corroborating witnesses and testimony as to the surrounding details were practically identical; Valdez was convicted and sentenced to death on his trial; Gatmaitan was convicted and sentenced to life imprisonment on his trial; the Supreme Court of the Philippines considered both appeals together, thus giving every opportunity possible to each defendant that could possibly arise from any discrepancy or weakness in the testimony adduced at each trial; and yet after so carefully and exhaustively considering all the testimony offered on both trials as to practically amount to a retrial of each case, and with a full realization of the gravity of their duty in the matter, four out of the six judges were absolutely convinced that the prosecution had proved its case against each defendant beyond a reasonable doubt. And the court was so firmly convinced of this that it raised Gatmaitan's sentence from life imprisonment to the death penalty.

In other words, after what amounted practically to four separate trials concerning the same crime, inasmuch as the testimony adduced concerning this crime was four times considered and reviewed, with every possible opportunity afforded to the defense by the offer of evidence, by oral and written argument, to explain away or overthrow or discredit the overwhelming testimony of the prosecution, six out of the eight judges who officiated at the various trials were unalterably convinced that Valdez and Gatmaitan committed this crime.

ASSIGNMENTS OF ERROR.

I.

The plaintiff in error offers ten assignments of error which are found in the record at pages 313–315:

Assignments numbered 2, 3, and 4 (Rec. 314) assert that it was a violation of the rights secured to the defendant by Article IV of the Amendments of the Constitution of the United States, and by Section 5 of the Philippine Organic Act, to try him without a preliminary investigation by a magistrate, and on an information signed by the Provincial Fiscal, but not sworn to. These objections, however, were made for the first time on a motion to set aside the judgment of the Supreme Court of the Philippines (Rec. 310). Moreover, the information was read to the defendant, and, without objecting to its form, he pleaded "Not guilty" (Rec. 6, 203); and subsequently he offered it in evidence as part of his case on the merits (Rec. 170, 171, 211). Neither of the matters, therefore, in

assignments of error numbered 2, 3, and 4 can now be considered by this court. *Dowdell* v. *United States*, 221 U. S. 325, 332. See also *Ocampo* v. *United States*, 234 U. S. 91, 99–101.

II.

Assignment of error numbered 5 sets up the lack of a presentment by a grand jury, and assignment numbered 6 the fact of a trial not before a petit jury. Both points are concluded by *Dowdell* v. *United States, ubi sup.*

III.

Assignment of error numbered 8 alleges that the affirmance of the judgment was contrary to law, but this is manifestly an inference from the other assignments and must stand or fall with them.

IV.

Assignments of error 1 and 7 allege that the court erred in affirming the sentence below because the latter was in violation of the Philippine Organic Act and of the Sixth Amendment to the United States Constitution in that the trial justice viewed the scene of the crime in the absence of the defendant; and that such proceeding violated the due process provision of the Organic Act and of the Constitution of the United States.

V.

Assignments of error numbered 9 and 10 allege that the Court erred in affirming the judgment because it was against the weight of evidence.

THE ISSUES INVOLVED.

It would seem, however, that the plaintiff in error has abandoned all contentions upon his appeal, save two, which are as follows:

(1) Whether the action of the trial judge in taking a view of the premises constitutes reversible error, and

(2) Whether the evidence given on behalf of the prosecution was sufficient to warrant the judgment of conviction.

ARGUMENT.

I.

The evidence adduced on the trial clearly warrants the conviction of the plaintiff in error.

We will first consider Point II on the brief of plaintiff in error as to the weight of evidence.

As above shown, the case was originally tried by the court without a jury (as provided by the Philippine law), and the accused was found guilty. On appeal to the Supreme Court of the Philippine Islands which, under the statute, reviews the facts as well as the law, the accused was again found guilty upon the evidence. This was the identical situation in the *Diaz case* (*Diaz* v. *United States* (1912), 223 U. S. 442,) and this Court there said after stating the fact:

> Of course these concurrent findings are entitled to great respect.

It may be, however, that as in the *Diaz case* this Court, following the rule recognized in *Wiborg* v. *United States*, 163 U. S. (1896) 632, 658, and *Clyatt* v. *United States* (1905), 197 U. S. 207, 222, will deem

it proper to examine the evidence as set forth in the record and discussed in the opinions of the Philippine Courts.

In this case, the Government, under ordinary circumstances, would have contented itself with relying, so far as the sufficiency of the evidence of guilt is concerned, on the opinion of the Supreme Court of the Philippines (which also incorporates the opinion of the trial court), as it would seem to be very difficult to improve upon the grave, impartial, and convincing statement of the facts made by that Court. The record, however, is voluminous, and the greater part of the brief of the plaintiff in error is given over to its consideration and to citations therefrom adduced to sustain certain contentions.

While not deeming it necessary to submit any elaborate cross discussion on this head, the Government feels that it would be remiss in its duty to this Court if it failed to point out the utter incorrectness of some contentions on the brief of the plaintiff in error, which purport to be based upon citations from the record.

The first instance occurs at pages 23–25 of the brief, wherein it is sought to establish by citations from the record that the Court did not consider that certain witnesses were to be believed under oath, and based its conviction as to the truth of their story upon the theory that they were too ignorant to have invented it.

Two citations are made, one from page 289 of the Record and the other from page 295.

One is from the opinion of the trial judge; the second from the opinion of the Supreme Court of the Philippines. The first paragraph fails to quote the language which directly follows in the trial judge's opinion, to wit:

> Their testimony is attacked strongly as being unlikely and suspicious but nevertheless it is strongly corroborated by the evidence of the record. (P. 289.)

The second paragraph of the first citation on page 24 of said brief from the opinion of the Supreme Court follows upon a discussion of the general rules of law laid down by the Philippine Courts as to the credibility of the testimony of accomplices and is directly followed in the record by this paragraph:

> Two separate judges saw and heard these witnesses testify at the separate trials in the court below, and notwithstanding the searching and insistent cross-examination to which they were subjected by able counsel, both judges were convinced beyond a reasonable doubt of the truth of their account of the commission of the crime, as hereinbefore set out. (Rec. 295.)

The next citation on page 24 of plaintiff in error's brief is from page 296 of the record; and there the Court stated it did not believe the witnesses were inspired by a guilty conscience, but directly afterwards used the following language which the said brief has omitted:

> Their confessions made to the police and their testimony given at the trial were all

> manifestly inspired by the hope that by telling what they knew of the crime they might save their own necks. (P. 296.)

And we respectfully submit that this is a far stronger inducement to tell the truth than mere remorse.

Again, the last paragraph on page 24 of the said brief also stops just short of the important qualification. There is not even a comma to indicate a break in the sentence upon the said brief which ends with the word "falsity," but which should continue "under the rigid cross-examination to which they were compelled to submit, if it had been false." (R. 304.)

On page 25 of said brief is another sample of misleading citation: The asterisks here are inserted with apparent frankness, but the matter thus left out vitally changes the citation which should read "could have invented the story told by this witness, *and corroborated by other witnesses and after having invented it*, that he could have instructed and prepared the ignorant *men* (not "man" as the brief has it) *so that they would not have involved themselves in hopeless contradictions under the cross-examination of able counsel to which they were compelled to submit.*" (Rec. 305.) The words in italics are those whose omission is indicated by the asterisks.

One more instance will serve to complete the purpose of this point. On page 44 of said brief, the counsel is attempting to demonstrate that the court ignored the presumption of innocence in favor of the defendant and placed the burden on him.

To demonstrate this he cites from page 286 of the Record the following:

> So then the evidence of the defense does not prove Valdez's innocence.

and states that "this is clearly an erroneous view of the law."

Possibly it might be, if it stood alone; but, unfortunately for counsel for plaintiff in error, it is followed by this language immediately:

> His salvation must be sought not in his evidence, but in that of the prosecution. If the evidence of the prosecution is not conclusive and any reasonable doubt should arise from its insufficiency, Valdez may be favored by the benefit of that doubt; otherwise it must inevitably be held that he is guilty.

We make no further comments upon these misleading citations.

II.

Even if the presence of the defendant at a view were a right upon which he might insist, it was a right which he could waive.

Considering now the first point on the plaintiff in error's brief.

A. Upon the question of view, it is important first to ascertain exactly what was done by the Court below and under what circumstances.

The point was first raised by motion for a new trial in the Supreme Court of the Philippines (Rec., 260), which would appear to be timely. (Sec. 3297, Phil. Comp. Laws.)

> SEC. 3297. At any time before the final entry of a judgment for conviction * * * a case may be reopened on account of errors of law committed at the trial. The motion must be in writing and must set forth the errors alleged to have been committed.

In support of the motion, there were filed six affidavits (Rec. 261–268). The first four are practically identical in form, and aver that the widow of the deceased told and described to the judge the place where her husband fell, and other things, and cried; and that Capt. Crockett, of the Constabulary, pointed out to the judge the place where one of the alleged murderers told him he stood when he fired the shot, and also pointed out to him certain streets and houses connected with the case. Affidavit 6 simply confirms affidavit 5, which is by the plaintiff in error's attorney and which merely enlarges somewhat on the other affidavits, particularly as to what Crockett told the judge (Rec. 266, 267). On behalf of the United States, four affidavits were filed (Rec. 271–276)—by the widow, by Crockett, by the assistant attorney, and by the attorney for the widow—directly contradicting the allegations of the other affidavits as to testimony being taken or evidence given, except such indications as are incidental to a view. The Supreme Court of the Philippines made a finding of the facts, as follows (Rec. 308):

> A careful examination of these affidavits and the counter affidavits filed by the appellee satisfied us that nothing more than inspec-

> tion of the scene of the murder was made by the trial judge, and that *no evidence whatever was taken on that occasion.*

While possibly this finding of facts by the Supreme Court of the Philippines is not conclusive on this Court, being bound up in a question of organic law (*Nor. and West. Ry.* v. *Conley* (1915), 236 U. S. 605, 609, 610); still it "is, at least, to have the effect of a verdict of a jury upon a question of fact, and should not be disturbed unless the error is manifest." (*Reynolds* v. *United States* (1878), 98 U. S. 145, 159; *Holt* v. *United States* (1910), 218 U. S. 245, 248.) So looked at, it can not be said to be without any support, considering carefully all the affidavits made on both sides and the interest of the persons making them.

The Supreme Court of the Philippines ruled that the defendant had assented to such a view and had waived his right to be present, and that he had a right to make such a waiver.

B. The record shows that the defendant waived the right to be personally present at the view; and also that his counsel was actually so present.

As to the defendant's waiver of his right, the record (pp. 198, 199) shows the following:

> Mr. BUENCAMINO. That is all. We will close our evidence, asking the court that it visit the place of the occurrence in order to make there an inspection so that the court may judge the distances.

Mr. CHICOTE. Yes; we do not object, so that the court may see.

The COURT. The result of that inspection will be evidence for both parties; therefore we will leave it until you have presented your rebuttal evidence.

Mr. SOUTHWORTH. Well, we wish that if the ocular inspection is to be made that the prosecuting attorney state what is the motive in making it.

PROSECUTING ATTORNEY. The object of this ocular inspection is that his honor may obtain an accurate idea of all the distance in connection with the assassination of the deceased, as well also of the places where the witnesses for the prosecution found themselves and where they talked together. We want that done in order that everything may be clear.

Mr. SOUTHWORTH. I have on two or three occasions been present at these ocular inspections held by the court and where they have there taken testimony that produced much confusion. What I wish, with the consent of the prosecuting attorney, is that an inspection be made there, but that no testimony be taken because it produces great confusion when one tries to examine witnesses at the place of the occurrence.

Mr. BUENCAMINO. What Mr. Southworth says would be very advisable, but I believe it would be very advisable also not to dispense with a task in which the court may exercise its discretion, so that when said court arrives there it may ask of unknown persons where the

deceased fell, where the wad was found, where Gatmaitan was, and where Mateo Arcilla was.

Mr. SOUTHWORTH. The prosecuting attorney has already proven that here, and there would be many questions and much cross-examination.

The COURT. The court has no objection to making that inspection after the defense has produced its rebuttal evidence, *not showing in the record the result of said inspection.*

Mr. SOUTHWORTH. We have no rebuttal evidence.

The COURT. So that we may close the case.

Mr. CHICOTE. Yes, sir.

The COURT. Good; tomorrow you may present your arguments. The session of the court is closed.

The record contains no evidence that the defendant ever asked to be present or that he ever objected to the taking of a view in his absence until after his trial and until the motion for a new trial.

The Government contends that he clearly waived his right, and his action was so construed by the Supreme Court of the Philippines (Rec. 308), where the Court said:

> The record clearly discloses that this inspection was made with the consent of the counsel for Valdez, and that the trial judge was accompanied to the place where the murder was committed by counsel for both the prosecution and the defense.

This ruling of the Philippine Supreme Court as to the fact of the waiver should also "have the effect

of a verdict of the jury upon a question of fact and should not be disturbed unless the error is manifest." (*Holt* v. *United States* (1910), 218 U. S. 245, 248; *Reynolds* v. *United States* (1878), 98 U. S. 145, 159.)

The plaintiff in error now contends that his "absence during part of the proceedings before the trial court constitutes an error requiring reversal." (Plaintiff's Brief, p. 8.)

C. The doctrine of the case of Hopt v. Utah is not applicable.

The doctrine that certain rights guaranteed by the Constitution can not be waived by a defendant is not a doctrine which appears to be established at Common Law by any cases in English courts, but appears to have been given a definite formulation for the first time by this Court in *Hopt* v. *Utah* (1883), 110 U. S. 574, where, on the authority of a rather broad statement in Blackstone (1 Com. 133), the Court said (p. 579):

> That which the law makes essential in proceedings involving the deprivation of life or liberty can not be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody to object to unauthorized methods;

and held that where a statute of the Territory of Utah provided that: "If the indictment is for a felony, the defendant *must* be personally present at the trial":

> "it was not within the power of the accused or his counsel to dispense with the *statutory* re-

quirement as to his personal presence at the trial." (P. 579.)

And again:

> *The legislature* has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, *such deprivation would be without that due process of law required by the Constitution* (p. 579).

Thus, it was held that:

(*a*) The right to be present at every stage of the trial was derived from the due process clause of the Constitution;

(*b*) That in a capital case it could not be waived where a Territorial statute made it mandatory.

The holding as to waiver was based on public policy (and see *Schwab* v. *Berggren* (1892), 143 U. S., 442, 448, 449).

In *Lewis* v. *United States* (1892), 146 U. S., 370, 372, it was said:

> A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has at times and in the cases of misdemeanors been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be person-

> ally present during the trial "It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give by inclining the hearts of the jurors to listen to his defense with indulgence." (Cases cited.)

It is important to note that the doctrine enunciated in *Hopt* v. *Utah* is merely that, by public policy, "that which the law makes essential" can not be waived by a defendant; and in *Trono* v. *United States* (1905), 199 U. S., 521, 533, it is pointed out that the *Hopt case* rested on the ground that "in the Territory of Utah the accused was bound, *by provisions of the Utah statute*, to be present.

Wherever a question arises, therefore, in a capital case, as to whether the defendant has or has not the power to waive a right, it is necessary to determine whether that right was or was not a *right "which the law makes essential."*

It is clear that not all rights guaranteed by the Constitution to a defendant in a criminal case are so "essential," by public policy, that they may not be waived. Let us see what these rights are:

(*a*) shall not twice be put in jeopardy of life or limb (Fifth Amendment);

(*b*) shall not be compelled to be a witness against himself (Fifth Amendment);

(*c*) shall not be deprived of life, liberty, or property without due process of law (Fifth Amendment);

(*d*) shall have speedy and public trial by an impartial jury (Sixth Amendment);

(*e*) shall be informed of the nature and cause of the accusation (Sixth Amendment);

(*f*) shall be confronted with the witnesses against him (Sixth Amendment);

(*g*) shall have compulsory process for obtaining witnesses in his favor (Sixth Amendment);

(*h*) shall have assistance of counsel for his defense (Sixth Amendment).

As to (*a*), it appears that there are circumstances under which a defendant will be held to have waived his right. See *Trono* v. *United States* (1905), 199 U. S. 521, and cases cited.

As to (*b*), there is no question that a defendant, even in a capital criminal case, may waive his right.

As to (*c*), there are certain elements of due process which are not so essential that they may not be waived. *Havard* v. *Kentucky* (1906), 201 U. S. 164, 175; *Frank* v. *Mangum* (1915), 237 U. S. 309, 310.

As to (*d*), it is clear that a plea of guilty, even to murder in the first degree, constitutes a waiver of trial.

As to (*e*), it is unquestionable that if a defendant proceeds to trial he will waive lack of information on the allegations of the indictment.

As to (*f*), under certain circumstances, a defendant may waive the privilege of confrontation. *Reynolds* v. *United States* (1878), 98 U. S. 145, 158; *Schick* v. *United States* (1904), 195 U. S. 65, 71.

As to (*g*), the right clearly may be waived.

As to (*h*), it is also clear that a defendant may, if he chooses, dispense with assistance of counsel. *Schick* v. *United States* (1904), 195 U. S. 65, 71.

D. The constitutional privileges claimed by the plaintiff in error do not confer a nonwaivable right upon a defendant in a criminal case to be present at a view taken by a single justice sitting without a jury.

The plaintiff in error contends that his right to be personally present at the view arose from one or all of three Constitutional provisions:

(A) Section 5 of the Philippine Organic Act, which provides that:

> "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel" and "to meet the witnesses face to face." Also "that no person shall be held to answer for a criminal offense without due process of law."

See Section 3270, Philippine Compiled Statutes, amplifying these provisions of the Organic Act, as follows:

> "In all criminal prosecutions the defendant shall be entitled to appear and defend in person and by counsel at every stage of the proceedings," and to be confronted at the trial by "and to cross-examine the witnesses against him."

(B) The Sixth Amendment of the Constitution of the United States:

> That the accused shall have the right * * * to be confronted with the witnesses against him * * * and to have the assistance of counsel for his defense.

(C) The Fifth Amendment, as including the right to be present at every stage of the trial, under the due process clause, that—

> no person shall be deprived of life, liberty, or property without due process of law.

As to each of these rights, therefore:

(A) The right of confrontation;

(B) The right to be heard by himself and counsel;

(C) The right to be present at every stage of the trial; we have to consider whether or not it is broad enough to include the right of the defendant to be present at a view of the premises, taken by a single trial judge sitting without a jury, and if so, whether or not the accused may waive it.

1.

The right of confrontation applies only to testimonial evidence and not to the presence of a defendant at a view.

It is clear that the privilege of confrontation, based upon the right to "meet the witnesses face to face," does not include the privilege of being present at a view, and does not extend to such "evidence," if it may be properly so called, as may be obtained at a view. In *Mattox* v. *United States* (1895), 156 U. S. 237, 242, the object of this right is shown to be the prevention of the introduction of depositions and ex parte affidavits by persons whom the accused might cross-examine. *It is intended to apply only to testimonial evidence;* or, as is said in the *Dowdell case supra*, on page 330, to "secure the accused in the right to be tried as far as facts provable by

witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence and give to the accused the opportunity of cross-examination." The distinction is brought out in the case of *Kirby* v. *United States* (1899), 174 U. S. 47, 54, 55. See also *Mattox* v. *United States* (1892), 146 U. S. 140, where a dying declaration was admitted; *Holt* v. *United States* (1910), 218 U. S. 245, 252, 253, where the privilege against self-incrimination was held not to exclude such evidence as might be obtained from the body of the accused; and *Reynolds* v. *United States* (1878), 98 U. S. 145, where evidence given on a former trial by a witness whose absence at the second trial was procured by the accused, was allowed to be read.

The Government submits that the right to be present at a view clearly can not be derived from the confrontation clause of the Constitution.

2.

The right to be heard by himself and counsel based on the Sixth Amendment to the Constitution of the United States does not confer the right to be present at a view.

It must be continually borne in mind with regard to this privilege that the plaintiff in error seeks only to assert it with respect to the view taken by the trial court without a jury, as hereinabove set forth. There is no contention that the accused was denied the exercise of this right at any other time during the trial. *And it has further appeared that he was actually represented upon this view by his coun-*

sel who consented that the view be taken and was present thereat.

The plaintiff in error insists that he had a constitutional right to be present personally at the view, based on that portion of Section 5 of the Philippine Organic Act (and of Section 3270 of the Philippine Code), which gives the defendant "the right to be heard by himself and counsel," and "that he shall be entitled to appear and defend in person and by counsel at every stage of the proceedings." As to the first provision, i. e., of the Organic Act, it may be said that it can not be any broader than that expressed in the Sixth Amendment to the Constitution of the United States which provides that the accused shall have the right to the "assistance of counsel for his defense." See *Kepner* v. *United States* (1904), 195 U. S., 100, 121. As to the second (the Philippine local statute) there can be no claim, that, except so far as the statute embodies a constitutional provision it can not be waived.

Upholding such a foundation for the right thus claimed by the plaintiff in error, if it were not for certain *dicta* in the case of *Diaz* v. *United States* (1912), 223 U. S. 442, 455 (considered *infra*), there is no weight of authority for the rule requiring the presence of the accused at all stages of the trial, which, while asserted universally in the jurisprudence of England, of the United States and of the several States, is not founded on the constitutional provision as to the right of "assistance of counsel for his defense."

It is derived from the early English Common Law and so it is stated in *Ball* v. *United States* (1891), 140 U. S. 118, 131.

By statute, in the reign of Edward III, it was provided (28 Ed. 3, c. 3, 1354) that "no man * * * shall be * * * taken or imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law." This was later said by Blackstone (4 Com., 318), to necessitate the presence of the defendant at the trial. Furthermore, it was the early law that in indictments concerning life and member a defendant must plead personally and not by attorney only (*Rex* v. *Bacon*, 1664, 1 Keble, 809; 1 Levinz, 146); that in criminal cases generally the defendant must be present at the trial to hear the testimony and have the opportunity to cross-examine the witnesses (*Rex* v. *Vipont*, 1761, 2 Burr, 1163; *Rex* v. *Aiken*, 1765, 3 Burr, 1785; *Rex* v. *Crowther*, 1786, 1 T. R., 125, 127; *Rex* v. *Baker*, 1745, 2 Strange, 1239, *contra*, but reconciled in the *Vipont case*); that the defendant must be present during the argument (*Rex* v. *Nicolls*, 1745, 2 Strange, 1227), and in felony cases, at the verdict, so that the jury may look at him (*Rex* v. *Legingham* or *Ladsingham*, 1670, 2 Keble, 687; T. Taym. 193); and if corporal punishment is to be inflicted, at the judgment (*Rex* v. *Harris and Duke*, 1689, 1 Ld. Raym. 267, 482; Skinner, 683; Comberbach, 447; Holt, 399; 1 Salkeld, 400; 12 Mod., 156; Lofft, 400; *semble Regina* v. *Templeman*, 1700, 1 Salk. 56). It has also been held that he must be present at a motion in arrest of

judgment (*Rex* v. *Hayes*, 1730, 2 Strange, 843), and on a motion for a new trial so that the court will be sure of him. (*Rex* v. *Gibson*, 1734, 2 Strange, 968; Sessions Cas. 123; 2 Barnardiston, 412; Cunningham, 29.) See also Chitty's Criminal Law, 337, 369, 411, 412, 414, 636, 653, 695; Coke on Littleton, 227b; 2 Hale's Pleas to the Crown, 299–301; 2 Hawkins' Pleas to the Crown, 633.

A compilation of the cases in all the States wherein any mention is made of the origin of this right shows that the overwhelming weight of authority attributes it to sources other than the constitutional source claimed by the plaintiff in error. (See Appendix A.) In most of the State courts, the right is held to be nothing more than reenactment of the Common Law (for example, see *Commonwealth* v. *Cody* (1896), 165 Mass., 133; *Frey* v. *Calhoun* (1895), 107 Mich. 130); in some, it is said to be based upon the common law itself; in others, partially upon the privilege of confrontation; and in only a few, upon provisions in the State Constitutions granting the privilege of being "heard by himself and counsel."

On the other hand, the historical grounds for the constitutional provision relative to "assistance of counsel," as given in the authorities, show that it was adopted for a reason entirely different from that for which the plaintiff in error contends. Originally, at Common Law, no counsel was allowed a prisoner in a felony case except on appeal, unless it became necessary to argue some point of law. (2 Hawkins

P. C., c. 39, secs. 1, 2, 3, and 4.) It was believed that "the simplicity and innocence, artless and ingenious behavior (sic) of one whose conscience acquits him," had "something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own," and further that it being "the duty of the Court to be indifferent between the King and the Prisoner," no special harm could come to the defendant." This rule, as pointed out by Blackstone (4 Com., 355); by Foster (Crown Cases, pp. 231, 232) and by Bishop (1 New Criminal Procedure, secs. 14–22, 120) led to such great abuses that to prevent any similar situation from arising here the constitutional provision permitting counsel for the defense was passed. (2 Story Constitution, Sections 1793 and 1794.) The wording of the clause as it appears in the United States Constitution brings out this object with unequivocal clearness.

The right of a defendant in a criminal case to be present at all stages of the trial is a right which had long been secured to him before the right to have counsel was granted to him at Common Law, and therefore was clearly not derived from the right to be heard by himself and counsel, given either by the Sixth Amendment or by the Organic Act of the Philippine Islands (as claimed by the plaintiff in error).

The dicta in the Diaz case.

In *Diaz* v. *United States* (1912), 223 U. S. 442, 453, it was objected that the accused was wrongly convicted of homicide not capital in that the trial pro-

ceeded in part in his absence. The facts, as stated by the Court, were these:

> The accused was represented and heard by counsel at every stage of the proceedings. He also was present in person at all the proceedings preliminary to the trial and at the time it was begun and during the major part of it. But on two occasions in the latter part of the trial he voluntarily absented himself and sent to the court a message expressly consenting that the trial proceed in his absence, which was done. On these occasions two witnesses for the Government were both examined and cross-examined. No complaint grounded upon his absence was made in the trial court or in the Supreme Court of the Philippines; and the objection now made is not that he did not voluntarily waive his right to be present, if he could waive it, but that it could not be waived, and that the court was therefore without power to proceed in his absence.

The Court then cited the provisions of the Philippine Comp. Stat. applicable, which are as follows:

> SEC. 3270. In all criminal prosecutions the defendant *shall be entitled* (*a*) to appear and defend in person and by counsel at every stage of the proceedings * * *.
>
> SEC. 3271. * * *. If the charge is for felony (*delito*), the defendant *must* be personally present at the arraignment * * *.
>
> SEC. 3280. A plea of guilty can be put in *only* by the defendant himself in open court * * *.

> SEC. 3296. The defendant *must* be personally present at the time of pronouncing judgment if the conviction is for a felony; * * *

and held that as three sections, 3271, 3280, 3296, were mandatory, and Section 3270 permissive, under the facts above stated the presence of the accused was not indispensable and there was no infraction of the Philippine laws in that regard.

It then discussed the provision of the Philippine Organic Act securing to the accused in all criminal prosecutions "the right to be heard by himself and counsel," and stated that a similar provision was found in the constitutions "of the several States" and "its substantial equivalent is embodied in the Sixth Amendment to the Constitution of the United States."

On the assumption that the right to be present at all stages of the trial was derived from the right to have "assistance of counsel," the court proceeded to say:

> In cases of felony our courts, with substantial accord, have regarded it as extending to every stage of the trial inclusive of the empaneling of the jury and the reception of the verdict and as being scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right; the one because his presence or absence is not within his own control, and the other

> because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction.

As, however, the case which it was considering was not a capital felony, the Court held that the right to be present at all stages of the trial was in such case a waivable right, saying (p. 459):

> We conclude that the Philippine laws before quoted accord to one charged with a felony *the full right expressed in the congressional enactment, as that right was recognized and understood in this country at the time it was carried to the Philippines* and that what was done in the present case there was no infringement of it.

The authority of the *Diaz case*, however, is limited to its actual decision on the facts involved; for in the language of Marshall, C. J., in *Cohens* v. *Virginia*, 6 Wheat., 264, 398:

> It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

"The prevailing course of decision" (referred to in the *Diaz case*, p. 455) was not to the effect, as expressed in the *dictum*, that "one who is charged with a capital offense is incapable of waiving the right" of being "heard by himself and counsel" if that right be construed to embrace the presence of the accused

throughout the trial. On the contrary, the right to be present at the trial had, as shown *supra*, been attributed by the courts of this country to a Common Law doctrine, which would be found in the Constitution in the due process clause and not in the assistance of counsel clause.

It is probable that it was the failure of the plaintiff in error in the *Diaz case* to take an assignment of error under or to argue the due process clause, that caused this Court to fail to notice that it was this clause rather than the assistance of counsel clause (under which assignment of error was taken), which was the true foundation of the right to be present at every stage of the trial.

3.

The right to be present at a view, if a constitutional privilege, must be derived from the right to be present at all stages of the trial. The latter right is derived from Common Law and is protected by the due process clause of the Fifth Amendment.

Having eliminated the confrontation and assistance of counsel clauses of the Constitution as sources of the defendant's right to be present at a view, we come to the due process clause of the Fifth Amendment as the source further claimed by the plaintiff in error.

As pointed out *supra*, the defendant's right to be present at all stages of the trial is properly derived from the rules of the old English Common Law, and therefore is secured to defendants in United States courts by the due process clause of the Constitution. But to sustain plaintiff in error's position and to bring

his right within the purview of the doctrine of *Hopt* v. *Utah, supra* (as limited and explained by later cases), two things must be established:

First. Is a view actually, in law, a "part of the trial" at which the Common Law required the defendant to be present?

Second. Was the right to be present at a view such an "essential" right, as public policy forbids to be waived, under the doctrine of *Hopt* v. *Utah*?

(a)

View was not a Part of the Trial at Common Law at which Defendant was required to be present.

On the first point, while there is some conflict of cases, the weight of authority and of reason is to the effect that a view is not such a "part of the trial." *People* v. *Thorn* (1898), 156 N. Y., 286; 42 L. R. A., 378–381, and cases there cited; *Price* v. *United States*, (1899), 14 D. C. App., 391, 405.

Prof. Wigmore very strongly holds that there is no necessity for the defendant's presence:

> As to the argument that the jury's view is a part of the trial and that the accused is entitled to be present at every part of the trial, the answer is that the accused might equally well claim to be present at the jury's deliberations over their verdict, for that is equally a part of the trial; if there is no inherent and invariable necessity for that part, neither is there for this. As for the related suggestion that the holding of a view in the

> absence of the defendant is the holding of a part of the trial "away from the place appointed for the holding of the court," it would follow from this that the judge and other court officers should be present also; but no one has ever supposed this necessary. It would be, on the contrary, much easier to question the propriety of the Court's adjourning and traveling in a body to the place of a view, for such a proceeding would be more open to the criticism that it took the trial "away from the place appointed for the holding of the Court." It is impossible to argue in the same moment both that the Court must be held at the place appointed and that it must be held in part somewhere else. (Wigmore, Vol. 3, Sec. 1803; Supp. Vol. 5, Sec. 1803.)

A few of the States hold that a defendant must be present when the jury are taken to visit the place of the crime, on the ground that a view constitutes a part of the taking of evidence (12 Cyc., 527, and cases cited); but the better opinion is that a view is not evidence, certainly not testimonial evidence.

It appears (see compilation of cases, Exhibit B, pp. 50–52 *infra*), that in the thirty-four States where the matter has been raised, the courts of thirty-three have decided that a view is in every case discretionary with the trial judge. Texas alone does not permit a view in a criminal case. Out of the same States only four, to wit, Kentucky, Mississippi, Montana, and West Virginia, have provided in their statutes on the subject of view that the defendant must be present.

In Louisiana, it has been held that under the Common Law the defendant must be present. In California and Arkansas, the courts have decided that the presence of the defendant was necessary at the view; in Nebraska, that he must waive the right; in Nevada, that his consent was necessary; in all the other States, that either his presence was not necessary, or that he could waive it and must be deemed to have waived the privilege, or that he actually had so waived it. A careful discussion of the reasons pro and con and a recapitulation of many of the authorities on the subject will be found in *State* v. *Mortenson* (1903), 26 Utah, 312.

From these authorities, it appears that the view is either not part of a trial at all, or at most it is not such a part of the trial as at which, for any reason of public policy, justice to the defendant or constitutional enactment makes the presence of the accused compulsory.

The most significant fact appearing from a consideration of the statutes authorizing a view in the various States is that, although the legislatures have been at the greatest pains to safeguard the conduct of the jury in almost every instance, only four out of thirty-four have made any provision for the presence of the defendant. An examination of the decisions of the courts under said statutes shows that the overwhelming majority not only believed that such view was not in any proper sense the taking of evidence, but that all necessary precautions were in-

corporated in the statutes to render it impossible that evidence should be taken at or by means of such view.

The great weight of authority, therefore, is to the effect that the presence of the defendant at a view is either unnecessary or undesirable, or both. The whole situation was well and tersely put in the case of *State* v. *Ah Lee* (1880), 8 Oregon, 214, murder, where the Court said:

> We consider the better doctrine to be that the failure of the accused to be present when the jury are taking their view is no ground of error. We are unable to see what good his presence would do, as he could neither ask nor answer any questions, nor in any way interfere with the acts, observations, or conclusions of the jury. He would have been only a mute spectator while he was there.

At this point reference may be made to the citations on the brief of the counsel for the plaintiff in error which purport to be authorities *contra* to the above.

Authorities cited by Plaintiff in Error in opposition to the above contention, pages 12 and 13, brief of plaintiff in error.

The first citation from Wharton on Criminal Law reads as follows:

> The visit (of the jury) must be made * * * in the presence of the accused who is entitled to have all the evidence received by the jury taken in his presence.

Counsel stops his quotation in the middle of a sentence, there being only a comma after the word "presence," the sentence continuing as follows:

> though a refusal to attend by the defendant, he being duly requested and empowered to do so, may not vitiate the proceedings.

Thus the doctrine of waiver is clearly implied.

The next citation from 22 Enc. Pl. & Pr., p. 1059, states the doctrine that a view in the prisoner's absence would violate the prisoner's constitutional right of confrontation. But here again, reading further from the same volume at the same place, we find the next paragraph to be as follows:

> The accused may, however, waive his privilege of being present at a view. A waiver exists where the view was directed on the motion of the accused and no request was made by him to be present thereat, and a defendant waives his privilege of being present at a view by declining to accompany the jury, though requested to do so.

The cases of *Tully* v. *Railroad Co.*, 134 Mass. 499, and *Wall* v. *United States Mining Co.*, 232 Fed. 613, are civil actions and hence not in point here. The remaining citations are one from California and one from Arkansas, which States have already been shown to be two of the very few that hold against the overwhelming weight of authority.

As to the casual statement of the trial court in the Record (p. 198) that "the result of that inspection will be evidence for both parties," relied on by counsel

for plaintiff in error, the Court said immediately thereafter (p. 199) that it had "no objection * * * to making that inspection, not showing in the record the result of said inspection," and the Philippine Supreme Court has found as a fact "that no evidence whatever was taken on that occasion" (p. 308 Rec.).

(b)

Even if part of the trial, view at Common Law was waivable.

Aside from the question as to whether a view, as a matter of law, is a part of the trial, it is clear that a defendant is not entitled to be present at every part of a trial. As Wigmore has shown, this right certainly can not be asserted during the deliberations of the jury, although such are undoubtedly part of the trial.

But even if the Government's contention be wrong, that a view is not such a part of the trial as requires the presence of the defendant, still it is unquestionably true that his right to be present at a view was not such an "essential" right at Common Law as could not be waived.

On the contrary, a survey of the history of the Common Law as to the practice of granting views clearly discloses the fact that the consent of the defendant was required to the taking of a view, and that therefore this consent could be given with conditions and would involve the presence or absence of the defendant, as he saw fit.

In the early days of English law it seems to have been the practice to grant a view when the title to

land was concerned. (Glanville, Book II, Chaps. I, II, and III; Britton; Translation of F. M. Nicols in the Legal Classic Series, 242, 243, 245 (117 et seq., Vol. I), 403 (192, Vol. II); Rolle's Abridgment, 725–731; Statham's Abridgment, translation of Klingelsmith, 1915, Vol. II, 1284–1292; Fitzherbert's Abridgment, 229–233; Brooke's Abridgment 303–306; Keilway, 51, 4 (1503); Keilway, 126, 88 (1503); *Herbert* v. *Vernon* (1560), 2 Dyer, 179a (41); *Stradling* v. *Morgan* (1560), Plowden, 199 at 305; Moore, 32n, 107 (1561); 2 Dyer, 210b (27) (1562); Moore, 68n, 184 (1564); *Livesey's case* (1588), Leonard, 86; *Dr. Ayray's case* (1614), 11 Coke, 18 at 22; *Calvin's case* (1609), 7 Coke, 1 at 3; *Heydon* v. *Godsole* (1614), 2 Bulstrode, 159 at 161. The law as laid down by these authorities is thus summarized in II Sheppard's Digest, 167, title "View":

> View is where an action is brought for land, and the defendant Doth not well know what land it is that the Demandant asketh, then the Tenant shall pray the View, that is, that he may see the Land which he claimeth. Then the Court will send Veyors to view the place in question for the better decision of the Right and if the Defendant deny, this is called a Counter-plea of the View.

At a later period it became clear that a view could be had in real actions only if the parties consented. In 2 Lilly's Abridgment, title "View" (1745), it is said:

> A view is for a jury to see the Land or Thing in Question, and lies in Ejectment, Waste, and

several real Actions; and also in Assizes of Novel Disseisin, where at least six of the Recognitors must have the View before the Assizes.

The Jury ought not to view the Place in Question betwixt the Plaintiff and the Defendant, without the Direction of the Court although the parties will consent. By Glyn Chief Justice, Pasch. 1656 B. S. For the Court is to direct all the Proceedings in Law, in order to the Trial, as being indifferent and best knowing to do that which is for the expediting of Justice.

The Court will grant that the Jury shall view the Thing in Question for them to try, if the Plaintiff and Defendant will consent unto it, otherwise not. Mich. 1650 B. S. Nov. 15.

See also 6 Comyn's Digest, 396 (1800).

And this rule remained unchanged as the practice of granting a view broadened. In criminal cases, as might naturally be supposed, a view, though later permitted generally, was at first only allowed when the indictmment related to land (*Sir Edward Duncomb's case* (1635) Croke's Charles 366 (indictment for narrowing a highway); *King* v. *Staughton* (1671), 2 Keble, 665; 1 Sid. 464; 2 Saunders, 160 (indictment for not repairing a highway).

The necessity of consent by both parties, however, before a view was permitted, persisted in this branch of the law, viz, criminal cases. (*King* v. *Kingsmill* (1714) 1 Sess. Cas. 87; *Anonymous* (1728) 1 Barnardiston, 144; *King* v. *Hatchley Tradgeley* (1732), 1

Sess. Cas., 180, also repeated as Anonymous, 2 Barnardiston, 214; *King* v. *Redman* (1756) Ld. Kenyon, 384), though by the statute of 4 Anne, c. 16, s. 8, in 1705, it was dispensed with in civil cases (1 Burr, 252). The *Redman case*, supra, evidently became the leading or at least the most accessible case in later times since *Bacon* (5. Abridgement, 375), *Thompson* (Trials, Section 879), and English cases refer to it first.

It seems, therefore, that at the time when the law of England became the Common Law of this country, a view in a criminal case could be had only if the defendant, among others, consented. The proceeding was wholly optional and a party, if he desired, might hedge it around with whatever conditions he saw fit. Likewise he could dispense with whatever conditions he pleased. If he consented to a view, a view could be had; so therefore if he consented to a view in his absence, a view could be had in his absence. Whatever conditions he desired were necessary, and whatever conditions he dispensed with were unnecessary. Such seems to have been the process relating to view in England at the time it became the due process protected by the Constitution. Except for the decision in *Commonwealth* v. *Parker* (1824), 2 Pickering, 552, holding that there could be no view in a criminal case in Massachusetts, there is no early authority one way or the other in this country. Subsequently, however, by Chapter 137, Section 10, of the Revised Statutes of 1836, it was provided that the court might order a

view by a jury in a criminal case and this has since been held to be a matter of discretion in that State. *Commonwealth* v. *Chance* (1899), 174 Mass., 245. See also *Commonwealth* v. *Knapp* (1830), 26 Mass., 496; *Commonwealth* v. *Webster* (1850), 59 Mass., 295.

It appears, therefore, that there was at Common Law nothing inalienable about the privilege of being present at a view, which due process would crystallize into a protected right either under the Fifth Amendment (or under that part of the Philippine Organic Act, derived from and embodying guaranties to be construed as identical with those of the Fifth Amendment—*United States* v. *Kepner*, (1904), 195 U. S., 100, 124).

Hence, it is submitted that the plaintiff in error can take nothing by assignments based on the due process clause of the Fifth Amendment.

In other words, inasmuch as presence at a view was, under the Common Law, optional with a defendant, it clearly was not such an "essential right," under the due process clause, as public policy forbade to be waived by such defendant. *Hopt* v. *Utah*, *supra*, is, therefore, inapplicable to the case at bar, and *Diaz* v. *United States*, *supra*, would be equally inapplicable, even if the *Diaz case* had held the right to be present at all stages of the trial to be derivable from the Due Process Clause (instead of from the Assistance of Counsel Clause).

III.

It would be contrary to Public Policy to hold that Defendant's presence at a View is legally necessary and nonwaivable.

The whole doctrine of the nonwaivability of rights by a defendant is founded, in the last analysis, on public policy, and is so stated in *Hopt* v. *Utah*.

The Government urges strongly upon this Court the impolicy of establishing any rule which should make mandatory and nonwaivable the attendance of a defendant in a criminal case at a view.

In the first place, at no properly regulated inspection can a jury (or as in this case, a single justice) do more than observe the lay of the land and the disposition of the objects of interest connected with the crime. No evidence can be taken and no criticism or opinion offered by either side. There is, therefore, in spite of remarks in the cases, no valid reason necessitating the presence of the defendant. That is obviously the reason why defendants have so often waived the privilege of attendance. In the second place, in many parts of the United States, especially in Alaska and the Philippines, views may be taken of places hundreds or even thousands of miles away from the place of trial. In our Southern and Western States, also, views may be taken in distant places and sparsely settled regions. Facilities for travel may be limited; means of conveyance insecure. A requirement of the presence of the

defendant, nonwaivable by him, presents a real danger or added facility for the escape, or rescue, of the prisoner.

A conclusion, therefore, which would extend to a criminal defendant a comparatively valueless privilege at the expense of the safe and effective execution of justice should be avoided if possible.

CONCLUSION.

For the reasons above stated, the judgment of the court below should be affirmed.

CHARLES WARREN,
Assistant Attorney General.

APPENDIX.

The cases herein cited under Appendix A show that the overwhelming weight of authority is to the effect that the privilege of being "heard by himself and counsel" was derived from the common law. (See p. 29, supra.)

Those cited under Appendix B show that a view is discretionary with the trial judge in thirty-three out of thirty-four cases where the question was raised; in Texas alone is the view forbidden. (See discussion on p. 36, supra.)

Appendix A.

State v. *Hughes* (1841), 2 Ala., 102; *Ex Parte Bryan* (1870), 44 Ala., 402; *Brister* v. *State* (1855), 26 Ala., 107; *Elias* v. *Territory* (1904), 9 Ariz., 1; *Sneed* v. *State* (1843), 5 Ark., 431; *Cole* v. *State* (1850), 10 Ark., 318, 324; *Sweeden* v. *State* (1857), 19 Ark., 205; *Warren* v. *State* (1857), 19 Ark., 214; *Brown* v. *State* (1867), 24 Ark., 620; *Osborn* v. *State* (1867), 24 Ark., 629; *Baker* v. *State* (1882), 39 Ark., 180; *Bearden* v. *State* (1884), 44 Ark., 331; *Gore* v. *State* (1889), 52 Ark., 285; *Bolling* v. *State* (1891), 54 Ark., 588; *Polk* v. *State* (1885), 45 Ark., 165; *Bond* v. *State* (1897), 63 Ark., 504; *Kinnemar* v. *State* (1899), 66 Ark., 206; *Stroope* v. *State* (1904), 72 Ark., 379; *Darden* v. *State* (1904), 73 Ark., 315; *Vasser* v. *State* (1905), 75 Ark., 373; *People* v. *Kohler* (1855), 5 Cal., 72; *People* v. *Miller* (1867), 33 Cal., 99; *Green* v.

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Brown (1876), 63 Mo., 439; *State* v. *Hoffman* (1883), 78 Mo., 256; *State* v. *Hope* (1889), 100 Mo., 347; *State* v. *Spotted Hawk* (1899), 22 Mont., 33; *Burley* v. *State* (1869), 1 Nebr., 385; *Dodge* v. *People* (1876), 4 Nebr., 220; *Miller* v. *State* (1890), 29 Nebr., 437; *Davis* v. *State* (1897), 51 Nebr., 301; *West* v. *State* (1849), 22 N. J. L., 212; *Donnelly* v. *State* (1887), 49 N. J. L., 252; *Jackson* v. *State* (1887), 49 N. J. L., 252; *State* v. *Peacock* (1887), 50 N. J. L., 34, reversed on another ground, 50 N. J. L., 653; *Territory* v. *Lopez* (1884), 3 N. Mex., 156, 162; *People* v. *Winchell* (1827), 7 Cowen, 525; *People* v. *Perkins* (1828), 1 Wend., 91; *Son* v. *People* (1834), 12 Wend., 344; *People* v. *Taylor* (1846), 3 Denio, 98; *People* v. *Clark* (1852), 1 Parker Cr. Repts., 360; *Maurer* v. *People* (1870), 43 N. Y., 1; *People* v. *Vail* (1879), 6 Abbott N. C., 206; *People* v. *Bragle* (1882), 88 N. Y., 585; *State* v. *Craton* (1845), 28 N. C., 164; *State* v. *Blackwelder* (1866), 61 N. C., 38; *State* v. *Kelley* (1887), 97 N. C., 404; *State* v. *Cherry* (1911), 154 N. C., 624; *Territory* v. *Gay* (1879), 2 Dakota, 125, 148; *State* v. *McLain* (1905), 13 N. D., 368; *Kirk* v. *State* (1846), 14 Ohio, 511; *Jones* v. *State* (1875), 26 Ohio St., 208; *Griffin* v. *State* (1878), 34 Ohio, 299; *Rose* v. *Ohio* (1851), 20 Ohio, 31; *Day* v. *Territory* (1894), 2 Okla., 409; *LeRoy* v. *Territory* (1895), 3 Okla., 596; *Ward* v. *Territory* (1899), 8 Okla., 12; *Humphrey* v. *State* (1913), 3 Okla. C. R., 504; *State* v. *Spores* (1871), 4 Oreg., 198; *State* v. *Carturight* (1881), 10 Oreg., 193; *State* v. *McDaniel* (1914), 70 Oreg., 235; *Jacobs* v. *Commonwealth* (1819), 5 S. & R., 315; *Dunn* v. *Commonwealth* (1847), 6 Pa., 384; *Prine* v. *Commonwealth* (1851), 18 Pa., 163; *State* v. *Guinness* (1898), 16 R. I., 401; *State* v. *David* (1880), 14 S. C., 428; *State* v.

Jefcoat (1883), 20 S. C., 383, 386; *State* v. *Brock* (1901), 61 S. C., 141; *Territory* v. *Gay* (1879), 2 Dakota, 125, 148; *State* v. *Swenson* (1904), 18 S. D., 196; *State* v. *France* (1809), 1 Overton, 434; *State* v. *Jones* (1820), 2 Yerger, 22; *Clark* v. *State* (1843), 4 Humphrey, 254; *Andrews* v. *State* (1855), 2 Sneed 550; *Witt* v. *State* (1867), 15 Coldwell, 15; *Richards* v. *State* (1892), 7 Pickle, 723; *Logan* v. *State* (1904), 4 Thompson, 75; *Beaumont* v. *State* (1877), 1 Texas App., 533; *Gibson* v. *State* (1878), 3 Texas App., 437; *Mapes* v. *State* (1882), 13 Texas App., 85; *Rudder* v. *State* (1890), 29 Texas App., 262; *Bell* v. *State* (1893), 32 Texas Crim. Rep., 436; *Emery* v. *State* (1909), 57 Texas App., 423; *Hopt* v. *Utah* (1883), 110 U. S., 574; *State* v. *Woolsey* (1899), 19 Utah, 486; *State* v. *Mannion* (1898), 19 Utah, 505; *State* v. *Mortensen* (1903), 26 Utah, 312; *State* v. *Wheeler* (1830), 3 Vt., 344; *Sperry's Case* (1838), 9 Leigh, 623; *Hooker* v. *Commonwealth* (1855), 13 Gratt., 763; *Jackson* v. *Commonwealth* (1870), 19 Gratt., 656; *Boswell* v. *Commonwealth* (1870), 20 Gratt., 860; *Lawrence* v. *Commonwealth* (1878), 30 Gratt., 845; *Shelton* v. *Commonwealth* (1892), 89 Va., 450; *State* v. *Duncan* (1893), 7 Wash., 336; *State* v. *Main* (1911), 66 Wash., 381; *State* v. *Schutzler* (1914), 82 Wash., 365; *Younger* v. *State* (1868), 2 W. Va., 579; *State* v. *Conkle* (1880), 16 W. Va., 736; *State* v. *Parsons* (1894), 39 W. Va., 464; *State* v. *Stevenson* (1908), 64 W. Va., 392; *French* v. *State* (1893), 85 Wis., 400; *Hill* v. *State* (1864), 17 Wis., 675; *Stoddard* v. *State* (1907), 132 Wis., 520.

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